NO. 80-5561

RECEIVED
NOV 24 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BEST COPY

WILLIAM HENRY HANCE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

JOHN C. WALDEN
Senior Assistant
Attorney General
Counsel of Record for
Respondent

ARTHUR K. BOLTON
Attorney General

ROBERT 3. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

MARY BETH WESTMORELAND
Assistant Attorney
General

WILLIAM J. SMITH
District Attorney

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334

QUESTIONS PRESENTED

1.

Whether the trial court properly determined that Petitioner had waived his rights and that, thus, Petitioner's confession was admissible.

2.

Whether those jurors excused for cause met the principles set out by this Court in Witherspoon v. Illinois.

NO. 80-5561

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WILLIAM HENRY HANCE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, William Henry Hance, was indicted in Muscogee County, Georgia, in August, 1978, for the murder of Brenda Gail Faison, a/k/a Gail Jackson, and for attempted theft by extortion. Petitioner was granted the right to represent himself at trial based on his request, and proceeded to trial with the help of co-counsel, Richard Smith and Walker Johnson. (R. 15-16, 20). (T. 421, 425). Following a trial by jury, Petitioner was found guilty on both counts and received the death penalty for murder and five years on the attempted theft by extortion charge. (R. 22-24).

The evidence at trial revealed that on or about February 28, 1978, the Petitioner, a soldier stationed at Ft. Benning, Georgia, went to a bar located near the base for a drink. While at the bar, he was approached by the victim, a prostitute named Gail Faison. After a price of $20.00 was agreed upon, the two got into the Petitioner's car. They drove to an area that the victim selected and she began to undress. At this time, the Petitioner became enraged and grabbed the victim. As she tried to get away, he hit her with a karate chop across the head. As the Petitioner then pulled her from the car, her elbow was dislocated. Petitioner returned to his car, thinking the victim was still alive, and got a jack handle from his car. Finding the victim to be still breathing, he struck her in the face with the jack handle repeatedly. The beating was so severe that the victim's face was destroyed and bone chips and fragments were scattered several feet from the body. (T. 488, 535, 538). The victim's body was then placed in a shallow grave dug with an entrenching tool.

During the same period of time, the City of Columbus, Georgia, was experiencing a series of unsolved strangulation-type murders. Between March 3 and April 5, 1978, Columbus Chief of Police, Curtis McClung received six letters in the mail from someone identified as the Forces of Evil. (T. 426-425). The letters, written on United States Army stationary, claimed that the Forces of Evil, a white organization, had kidnapped two black women, Gail Jackson and a woman named Irene. (T. 428-429, 430-433). The letters' author threatened to kill the women if the Columbus strangler was not caught by June 1, 1978. (T. 428, 430-433, 440-445). The third

letter, dated March 25, 1978, stated that Ms. Jackson's body would be found April 1, in the Sand Hill area near Ft. Benning. (T. 435, 444). The writer also demanded payment of $10,000.00 by June 1 to prevent the continuing execution of black women. (T. 431).

A fourth letter to the police stated that the military police would get a telephone call on April 1 giving the exact location of the body of Gail Jackson. The writer further gave the exact details of the injuries to Ms. Jackson's body. (T. 447). The fifth letter asserted that Ms. Jackson would die April 1 and Irene would die June 1. (T. 451).

On March 15, 1978, Petitioner went to Vice Mitchell's Bar. Petitioner saw Irene Thirkield at the bar and gave her a ride. She apparently attempted to solicit the Petitioner for purposes of prostitution. After she removed her clothes, Petitioner again became enraged and attacked her as he had attacked Ms. Jackson. The beating was so severe that the entire head was missing from her body.

On March 30, 1978, MP Specialist George Thompson and Sergeant James Harris at Ft. Benning each received a telephone call from an unidentified black male giving the location of Gail Jackson's body. (T. 459-463). A Columbus Police Department receptionist also received a call on March 30, from an individual who sounded like a black male stating that Jackson's body was by a tree near the Sand Hill Bar. (T. 471-475). The body of Gail Jackson was found on March 30 in the area described by the anonymous caller.

On April 3, a phone call was received at Ft. Benning from a man informing the seargent that the body of a woman

named Irene could be found in a particular area of the Ft. Benning reservation. The caller, who sounded to the sergeant like a black male, stated that he was a member of the Forces of Evil. (T. 626-627). Following the directions of the anonymous caller, the military authorities found the body of Irene Thirkield.

The military police, acting upon information that the Petitioner was the last person seen with Irene Thirkield, questioned the Petitioner and obtained a confession as to both murders. Subsequently, the Petitioner gave a confession to Columbus authorities and told where he had disposed of the murder weapons and clothes of the victim. Handwriting samples were obtained and matched those on the letters received by the Chief of Police. Furthermore, a fingerprint on one of the letters was determined to be that of the Petitioner.

Based on this evidence, the jury found that "The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim." Ga. Code Ann. § 27-2534.1(b)(7).

Based on the State's automatic appeal procedure in death penalty cases, Petitioner's case was reviewed by the Supreme Court of Georgia. At that time, the Petitioner asserted that the State failed to sufficiently prove venue, that the trial court erred in failing to suppress his confessions, that Ga. Code Ann. § 27-2534.1(b)(7) is unconstitutional, that the statements made as a result of his interrogation should have been excluded because there was an illegal arrest, that certain witnesses were excused

in violation of Witherspoon, as well as numerous other errors relating to the death penalty itself. The Georgia Supreme Court examined each enumeration in detail and found them all to be without merit. Thus, the Court affirmed Petitioner's conviction on June 24, 1980. Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980). A Motion for Rehearing was denied by that Court. Petitioner has now filed the instant Petition for a Writ of Certiorari in this Court.

Further facts will be developed as necessary for a more thorough consideration of the issues raised by the present petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. PETITIONER'S STATEMENTS WERE PROPERLY ADMITTED AT TRIAL BASED ON A DETERMINATION BY THE TRIAL COURT THAT SUCH STATEMENTS WERE FREELY AND VOLUNTARILY GIVEN.

Petitioner asserted at trial and before the Supreme Court of Georgia that the statements that he gave that were admitted at trial should have been excluded. Petitioner has asserted various reasons in attempting to show the inadmissibility of these statements. Respondent asserts that, as found by the state courts, the statements were freely and voluntarily made.

In the instant petition, Petitioner specifically challenges the admissibility of his statements at trial because he asserts a denial of his right to counsel. Petitioner claims that his counsel made repeated efforts to locate him and that Petitioner requested to see a lawyer during his questioning. Petitioner further asserts that the trial court found Petitioner's statements voluntary despite the above allegations.

As asserted by Petitioner, under Miranda v. Arizona, 384 U.S. 436 (1966), the right to counsel is considered to be a right essential to protecting the Fifth Amendment privilege against self-incrimination. However, like all other constitutional rights, this right can be waived.

To properly consider this issue, it is essential to briefly review the evidence presented at trial in regard to Petitioner's confession. A Jackson v. Denno hearing was

conducted at trial concerning the admissibility of Petitioner's statements. (T. 679-742). The only witnesses testifying during that hearing were Richard Fox of the C.I.D., Charles Rowe of the Columbus Police Department and the Petitioner himself. Based on the evidence introduced by these three witnesses, the Court found that Petitioner had been advised of his rights and that his statements were admissible.

The evidence shows that Agent Fox and Agent Bessom went to Petitioner's unit on April 4, 1978, and advised Petitioner that they would like to talk with him. Petitioner willingly accompanied the two agents to headquarters where he was advised of the nature of the matter which they wanted to discuss with him. Petitioner was also advised of his rights, agreed to waive these rights and sign a written waiver form. (T. 683-684). Petitioner was questioned for approximately nine to ten hours on that day. Petitioner was allowed breaks for an evening meal and was allowed to use the restroom. Petitioner was furnished coffee and was allowed to smoke. Agent Fox testified that Petitioner never requested an attorney, nor did he state that he wished to terminate the interview. (T. 685).

Petitioner was taken to the bachelor enlisted quarters for the night. The interview was scheduled to commence at 8:00 a.m. the next day, however, when Agent Fox arrived at his office at 7:30 a.m., Petitioner was there and stated that he was anxious to get started with the interview. Petitioner again was advised of all of his rights and again signed a waiver form. (T. 689-691). Shortly after the lunch break on that day, Petitioner began admitting his participation in the crimes. After this, a written statement was taken and Petitioner signed the statement. (T. 693-695).

Agent Fox testified that on April 6, 1978, he learned that someone may have acquired an attorney for the Petitioner. Mr. Fox testified that when he asked Petitioner if he would like to talk with the attorney, the Petitioner refused. (T. 696-697).

On April 6, 1978, Petitioner was interviewed by Detectives Rowe and Day of the Columbus Police Department. Detective Rowe again advised Petitioner of his rights and Petitioner again signed a waiver form. (T. 708-710).

When Petitioner took the stand at the Jackson v. Denno hearing, he admitted signing the waiver forms and being advised of his rights by Agent Fox. The only contradiction in Petitioner's testimony as to the waiver, is that Petitioner asserted that after signing the waiver, he requested to see an attorney. This is directly contradicted by the testimony of Agent Fox. The remainder of Petitioner's testimony dealt with a contention that his confessions were coerced by Agent Fox. At no time during the Jackson v. Denno hearing, was Petitioner's alleged counsel called to testify. Thus, the Court did not have his testimony available in its determination of the voluntariness of Petitioner's confession and in determining the question of whether Petitioner had been advised of his rights.

Later during trial, when Petitioner was presenting the defense of the case, Attorney David Clark was called as a witness. This testimony was presented before the jury and sometime after the Jackson v. Denno hearing had been concluded. Mr. Clark testified that he had represented the Petitioner in a divorce case previously. He became aware that Petitioner

had been arrested and tried to get in touch with him. Mr. Clark could not remember the exact days that he tried to contact the Petitioner or on what day he actually saw the Petitioner. Mr. Clark testified on cross-examination that he does not do any criminal work. (T. 914). He testified that his purpose in trying to locate the Petitioner was to try to make the Petitioner aware "of what his rights were, and be sure that he had the opportunity for counsel". (T. 915). He was not seeking to represent the Petitioner in the case. Thus, contrary to what Petitioner asserts before this Court, Mr. Clark was not Petitioner's counsel at this time, but was merely an attorney who had represented the Petitioner in the past. Mr. Clark did testify that he received a card from the jail signed by the Petitioner asking him to come and talk with him; although, this was apparently sent after Petitioner had previously waived his rights and made the statements to the authorities.

Respondent submits that the evidence clearly shows that Petitioner was fully advised of his rights, including his right to counsel, on numerous occasions and that Petitioner waived his rights on each of these occasions. Although Petitioner states that he asked for an attorney on one occasion, the police authorities testified that Petitioner never asked to see an attorney. Thus, the trial court was fully authorized to conclude that the State had shown by a preponderance of the evidence that Petitioner had waived his right to have counsel present. Furthermore, there has been no showing that Mr. Clark was deliberately kept from seeing the Petitioner. It appears that Mr. Clark was attempting to locate the Petitioner at a time when the Petitioner was being transferred

between the military authorities, the Columbus City Police and the Muscogee County Jail. Mr. Clark was not Petitioner's counsel, but was merely attempting to advise Petitioner of his rights. This had clearly been taken care of by the police authorities. Based on the evidence submitted at trial, Respondent submits that not only was Petitioner's statement given freely and voluntarily, but Petitioner was thoroughly advised of all of his rights and decided to waive those rights. Thus, the constitutional requirements set out by this Court have been met. See Lego v. Twomey, 404 U.S. 477 (1972); Clewis v. Texas, 386 U.S. 707 (1967). Therefore, Petitioner's allegation concerning his confession is without merit.

B. NO JURORS WERE IMPROPERLY EXCLUDED AT TRIAL IN VIOLATION OF WITHERSPOON PRINCIPLES.

Petitioner has asserted before the Supreme Court of Georgia as well as before this Court that certain jurors were excused for cause in violation of the principles of Witherspoon v. Illinois, 391 U.S. 510 (1968). Respondent submits that all jurors excused for cause were properly excluded because they stated that could not vote for the death penalty.

Those jurors excused for cause due to their opposition to the death penalty were James R. Beard, Florestine S. Crenshaw, Dianne A. Spivey, Mamie R. Rowell, Syble G. Melton and Mary Turpin. Petitioner conceded before the Georgia Supreme Court that Ms. Spivey and Ms. Rowell were properly excluded as they were so opposed to the imposition of the death penalty that they would not vote for it no matter what the facts and circumstances. (T. 228-230, 298-301).

Petitioner does not challenge these two jurors before this Court. Petitioner has also not challenged the exclusion of Ms. Melton before this Court. Thus, Petitioner has only challenged the exclusion of Ms. Turpin, Ms. Crenshaw and Mr. Beard.

Mr. Beard initially stated that he opposed capital punishment and was against it in certain circumstances. He then stated that he could not vote for the death penalty no matter what the facts and circumstances of the case might be. (T. 139). After questioning by counsel for the Petitioner, Mr. Beard again stated that "I would not vote for the death penalty." (T. 141). At that point, counsel for the Petitioner stated, "That seems to be clear, your honor. We won't oppose it." (T. 141). Thus, Petitioner's counsel admitted during voir dire that this juror clearly fit within the standards of Witherspoon. Thus, Respondent submits that this juror was not only positively opposed to the imposition of the death penalty, but this was clearly admitted by Petitioner's counsel. Thus, any challenge to the excusal of this juror has been waived.

The second juror excused for cause and challenged by the Petitioner was Florestine S. Crenshaw. Ms. Crenshaw initially stated that she was conscientiously opposed to the death penalty. She said that she was not sure if she could vote to impose the death penalty; however, she then stated that her feelings were so strong that she could not impose the death penalty no matter what the facts or circumstances would show. (T. 190).

After further questioning, Ms. Crenshaw seemed to indicate that she might be able to impose the death penalty under certain circumstances; however, after additional questioning by the District Attorney in which he asked, "Are you prepared to vote to impose the death penalty if the facts and circumstances of this case justify it?", Ms. Crenshaw stated that she was not. (T. 194). After questioning by the Court, she again stated that she could not impose the death penalty even if the facts and circumstances of the case justified it. (T. 195). Finally, the Court stated as follows:

> "Well, as I understand it, you have said that there may be in certain cases facts and circumstances in which you would find that the death penalty should be imposed, that means given to someone. But, under no circumstances as far as this man is concerned, would you impose the death penalty, is that wrong?
>
> Ms. Crenshaw: You're right.
>
> The Court: I'm right?
>
> Ms. Crenshaw: Right."

(T. 196). Thus, Ms. Crenshaw clearly stated that no matter what the facts and circumstances showed, she could not vote to impose the death penalty in the instant case. This is clearly no general objection to the death penalty. Ms. Crenshaw would not be willing to consider all the penalties provided by law and was irrevocably committed to vote against the death

penalty regardless of the facts and circumstances. See Witherspoon, supra at 522, n. 21; Boulden v. Holman, 394 U.S. 478 (1969).

Ms. Mary Turpin initially stated that she felt like if the Defendant were guilty, he should be punished. She then stated that she did not believe in giving the death penalty. In response to a question asking if she could vote for the death penalty no matter what the facts or circumstances would show, she stated, "No, I'd just vote for him to be punished." (T. 362). The prosecution asked, "You could vote on guilt or innocence, but you could not vote to give the death penalty no matter what the facts might be?" Ms. Turpin responded, "That's right." (T. 363).

During further questioning, Ms. Turpin did seem to equivocate somewhat in her answer. However, she continued to state that the idea of imposing the death penalty bothered her. She again stated that she just did not think she could vote to impose the death penalty. (T. 365). In considering all of Ms. Turpin's answers and the entire circumstances of the voir dire, it is clear that she was not willing to consider all penalties provided by law and would have been committed to voting against the death penalty regardless of the facts and circumstances.[1]

Petitioner has placed great emphasis on this Court's recent decision in Adams v. Texas, __ U.S. __, 65 L.Ed.2d 581 (1980). Respondent submits that Adams has set forth

---

1/ It should be noted that Ms. Turpin was also in such a position on the jury list that her name would have only been included in the pool for possible alternate jurors. The full panel of twelve, as well as three alternate jurors, had been chosen before the place on the list was reached where Ms. Turpin would have been. Furthermore, the State had two peremptory strikes remaining after the initial twelve jurors were struck.

no new guidelines, but merely reiterates those guidelines set forth in Witherspoon. As noted, those veniremen who would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them" could be excluded. Adams, supra at 593. Thus, Respondent submits that the trial court clearly met the standards set forth by this Court.

Petitioner has attempted to isolate certain specific answers by each prospective juror to find that they were improperly excluded. Respondent asserts that this Court should consider the entire questioning of each juror in determining whether the juror was properly excluded. In considering the statements made by all three jurors, it is clear that they were properly excluded under the principles set forth by this Court. Thus, this allegation is without merit.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari filed on behalf of the Petitioner, William Henry Hance.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant Attorney General

JOHN C. WALDEN
Senior Assistant Attorney General
Counsel of Record for the Respondent

MARY BETH WESTMORELAND
Assistant Attorney General

WILLIAM J. SMITH
District Attorney

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3339